United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

B P/S

75-6114

To be argued by
RICHARD L. HUFFMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6114

BRUBRAD COMPANY,
Plaintiff-Appellant,

—*against*—

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
Attorney for Defendant-Appellee,
United States Postal Service.

JOSEPHINE Y. KING,
RICHARD L. HUFFMAN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6114

BRUBRAD COMPANY,
Plaintiff-Appellant,

—against—

UNITED STATES POSTAL SERVICE,
Defendant-Appellee.

BRIEF FOR THE APPELLEE

Preliminary Statement

Plaintiff-appellant commenced this action in the United States District Court for the Eastern District of New York seeking reformation of a contract entered into in 1964 in which it agreed to lease a building to the United States Post Office. Plaintiff contends that the devaluation of the dollar coupled with an unprecedented inflation were not contemplated by either party in 1964 and that defendant is being unjustly enriched by continuing to pay a rent set in terms of 1964 dollars in 1974 currency.

On November 10, 1975 United States District Court Judge Orrin Judd granted the defendant United States Postal Service's motion for summary judgment and dismissed the complaint. Judge Judd decided that the plaintiff had failed to plead sufficient facts to maintain a cause of action for reformation. He also found that the contract

could not be "interpreted", even by going beyond the challenged provision to the contract in its entirety, including the circumstances of its negotiation, as stating anything other than the plain meaning of its terms. Furthermore, the court found that public policy, as declared by the United States Congress, requires that obligations be paid in currency which at the time of payment is legal tender for public and private debts. The plaintiff is appealing from this decision.

Statement of the Case

Plaintiff's predecessor, Brubrad Corporation, entered into a lease agreement with defendant's predecessor the United States of America on November 4, 1964 (Appendix, hereinafter "A", 14). Under the terms of the lease, the then Post Office Department agreed to pay Brubrad Corporation $510 per month for a period of 10 years for the use of the premises at 2934-36 Avenue X, Brooklyn, New York (A-19). The lease could be renewed at the option of the defendant for four five year periods, at the rental rates of 475, 500, 525 and 550 dollars per month respectively (A-18).

The lease was entered into after a process of public bidding and negotiation during which two other bidders offered to lease their properties to the Post Office Department (A-29). The original bid submitted by Brubrad, although the lowest of the three bids, was further reduced after negotiations with the Post Office (A-19). The terms of the lease provide that the Post Office shall pay for the fuel used to heat the building as well as electricity (A-28). The Post Office Department exercised its option in 1974 and renewed the lease for a five year period at the stipulated monthly rental of $475 for the first renewal.

Plaintiff then brought this action for reformation, complaining that neither of the parties at the time the lease was entered into contemplated the "enormous declining value of the dollar which would occur in the lease and option period" (A-15). Appellant argues that a combination of factors, the unilateral act of the United States in devaluing the dollar coupled with inflation, give it a cause of action. Appellant contends that 31 U.S.C. § 463 which requires payment of obligations in current legal tender is inapplicable, citing *Perry* v. *United States*, 294 U.S. 330 (1935). Defendant moved to dismiss plaintiff's complaint upon the grounds that reformation of a contract could be obtained only if the contract clearly did not express the meaning or intention of both parties to the contract, and that the term "dollars" clearly meant just "dollars" to the defendant, not "dollars payable at the 1964 standard of value". Defendant also contended that the *Perry* decision, *supra*, affected *only* those contracts entered into by the government prior to the passage of 31 U.S.C. § 463 in 1933, and that all obligations, whether public or private, entered into after 1933 were subject to the statute's requirement that obligations be payable in "currency which at the time of payment is legal tender . . .". Judge Judd granted defendant's motion to dismiss, finding that plaintiff had failed to state sufficient grounds for judicial reformation, or even interpretation of the contract, and that the contract was governed by 31 U.S.C. § 463

ARGUMENT

POINT I

By statutory mandate the defendant is required to make payment under the lease in current legal tender.

Plaintiff asks that the court construe the rental terms in its lease with defendant as requiring payment in the equivalent of 1964 dollars. Appellant contends the statute which requires that debts be paid in current legal tender, 31 U.S.C. § 463 (set forth fully below), is invalid as to its contract with defendant. Plaintiff recognizes that Congress has the authority to prohibit provisions in private contracts which tie payment to a particular kind of coin or currency, but argues that Congress cannot under the *Perry* v. *United States*, 294 U.S. 330 (1935) decision prohibit such a clause in its own contracts. Plaintiff goes further in attempting to find grounds for a valid complaint and contends that unlike the plaintiff in *Perry*, appellant is not seeking payment in gold (the possession of which was illegal in 1973 and which consequently barred the Supreme Court from granting Perry relief) but payment in dollars. Defendant takes the position that 31 U.S.C. § 463 is effective as to the contract and the *Perry* decision does not provide plaintiff with any relief from its operation.

In 1933 the United States Congress passed 31 U.S.C. § 463 as part of a package of legislation which sought to eliminate the "gold clause" from contracts; it reads as follows:

> (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount

> in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

This statute along with its companion legislation was held constitutional by the Supreme Court in the "gold clause" cases of 1935. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240 (1935); *Nortz* v. *United States*, 294 U.S. 317 (1935); *Perry* v. *United States*, 294 U.S. 330 (1935).

The statute clearly states that the public policy of the United States is against allowing parties the "right to require payment in . . . a particular kind of coin or currency, or in an amount of money of the United States measured thereby . . .". The appellant is asking for its rental payments in a particular kind of currency—1964 dollars. If the court were to grant appellant's request the judgment would contravene established public policy. Payment of a 1975 debt in 1964 dollars would directly contradict that portion of § 463 which requires obligations to be paid in "any coin or currency which at the time of payment is legal tender for public and private debts."

Appellant attempts to overcome 31 U.S.C. § 463 by relying on one of the "gold clause" cases, *Perry* v. *United States*, *supra*. In the first part of the *Perry* decision, the

Court stated that the obligations of the United States which were *entered into prior to* the passage of 31 U.S.C. §463 and which require payment "in United States gold coin of the present standard of value" must be honored. The Court noted that while Congress had the power to invalidate such clauses in contracts between private parties *ex post facto* it could not, after the fact, extinguish its own contractual obligations. The contract in the present case is not, however, a contract which was entered into prior to 1933, the year when 31 U.S.C. § 463 became the law. This contract was signed in 1964, over 30 years later. While Congress may not change its own contracts *ex post facto* it clearly has authority to set future policy. Article I Section 8 of the Constitution. Under the first part of the *Perry* holding, therefore, the plaintiff did not state a cause of action.

Appellant's lengthy distinction of the second part of the *Perry* decision is irrelevant. In the second part, the court refused to award damages on the ground of impossibility of performance; the damages could not be paid in gold since Congress had prohibited the circulation of gold. Appellant here contends that it does not seek gold, but the equivalent in 1974, and future option renewal years, of 1964 dollars. The issue of damages, however, need not be reached. The plaintiff had failed to satisfy the first requirement of *Perry* by not stating a good cause of action, and for that reason the dismissal below is proper.

POINT II

Reformation of a contract may be obtained only under exceptional circumstances.

An action for reformation of a contract is generally available, according to hornbook law, on the following theory:

> Reformation of a written instrument will be decreed when the words that it contains do not correctly express the meaning that the parties agreed upon, as the court finds to be convincingly proved. . . . Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to antecedent expression on which the parties agreed. 3 Corbin, *Contracts* § 614 (1960).

See also, Restatement, *Contracts* § 504; 13 Williston, *Contracts* § 1547 (3d ed. 1957). Appellant does not charge the United States Postal Service with fraud, but alleges the existence of a 'mutual mistake' which led to an omission or misunderstanding regarding the kind of money or value of the money which was to be used by the lessee to pay the rent. Appellant therefore seeks to change only that part of the lease governing the amount of rent payable to the lessee.

Courts have been extremely reluctant to grant the remedy of reformation except under the most compelling circumstances and where mutual mistake obviously and clearly existed. *See* Williston, *id.* A clear, definitive statement on the availability of the remedy of reformation was made by the United States Supreme Court in *Columbus Ry.* v. *City of Columbus*, 249 U.S. 399, 414 (1918), when the Court ordered a street car company which had contracted with a City to operate street cars for a specific

fare, to continue to operate the street cars even though their operation, as a result of inflation, was no longer profitable. The court indicated that there was no omission; inflation might have been contemplated by the parties. As long as operation of the street cars was not impossible to perform, even though at a loss, the company was required to continue to do so. In its decision the Court stated (249 U.S. at 414):

> But equity does not relieve from hard bargains simply because they are such.

Case after case reaffirms the proposition that absent clear mutual mistake or omission, reformation will not be granted. For example, in refusing to reform an insurance policy to cover a decedent who had mistakenly believed she was covered in the event of death caused by an airplane crash the court stated:

> But reformation is an extraordinary remedy, and courts exercise it with great caution. . . . Even in situations where obvious mistakes have been made, courts will not rewrite the contract between parties, but will only enforce the legal obligations of the parties according to their original agreement. *Mutual of Omaha* v. *Russell*, 402 F.2d 339, 344 (10th Cir. 1968).

See also, *Capital City Gas Co.* v. *Phillips Petroleum Co.*, 373 F.2d 128 (2d Cir. 1967); *Shopen* v. *Bone*, 328 F.2d 655 (8th Cir. 1964).

On those few occasions where an attempt has been made to reform the lease or sale of land made by a public bidding procedure, the courts have held that public policy prohibited the use of an equitable remedy such as reformation. *See State* v. *Kahua Ranch Ltd.*, 384 P.2d 581 (1963); *Trachtenberg* v. *Glen Alden Coal Co.*, 47 A.2d 820 (1946). To hold otherwise would be to invite fraud

and collusion at public, competitive biddings, and destroy the element of certainty so necessary in such transactions. *See generally* Williston, *supra*, § 1547. In this instance, plaintiff was selected from three competitive bidders; to change the terms of the subject of the bid now would manifestly work to the detriment of the other two bidders.

In sum, courts have consistently held that valid contracts are to be enforced and performed as written. Merely because unforeseen difficulties are encountered which render performance less profitable, or even cause pecuniary loss, a party will not be excused from performance or be entitled to additional compensation.

POINT III

Appellant is not entitled to a judicial interpretation of the contract which would increase rental payments.

The lease agreement on its face plainly and clearly states that the rental "shall be $6,120.00 per annum" (A-19). Nowhere in the lease is the rental price expressed by a term other than "dollars". There is then no basis for a Court to go beyond the plain meaning of the contract. *Western Union Telegraph Company* v. *American Communications Association*, 299 N.Y. 177 (1949); *see, Caminetti* v. *United States*, 242 U.S. 470 (1917).

However, even if the court were to venture beyond the express language of the contract, there is nothing to support plaintiff's proferred interpretation. The terms of the contract were negotiated after an open bidding procedure during which prices were referred to in terms of "dollars" (A-29-30). After the rental price was bid upon and accepted it was then reduced through negotiation (A-16, 19). This entire process was clearly done at

"arms length" and, since the projected renewal rental price increased over time, presumably the parties considered possible inflation and the concommitant increase in value of the lease. There is therefore no evidence either on the face of the lease or from the circumstances surrounding the negotiations and signing of the lease which in any way lends support to appellant's position. Judge Judd was entirely correct in refusing at this point in time to rewrite the contract.

POINT IV

Plaintiff has failed to plead facts which warrant the granting of equitable relief.

Plaintiff makes much of the unilateral action of the United States in devaluing the dollar and ascribes most if not all of the present day inflation to actions and policies of the United States. In other words, plaintiff alleges the United States government is responsible for the depreciated value of the present dollar and the conscience of equity should compel the lessee to satisfy its obligations on a 1964 dollar value equivalent basis rather than "dollar for dollar".

One need only look to the "fuel crisis" and its aftermath, or the world-wide drought and crop failure, to find two major causes of inflation completely disconnected from calculated economic determinations attributable to the United States Government. In fact, one could readily argue that the policies of the United States have been aimed at curbing rather than encouraging inflation.

The lessee pays for the fuel and electricity used at the premises, two expenses commonly recognized as hardest hit by inflation (A-19) leaving plaintiff to cover only the increased cost, if any, of maintenance and taxes. That

increase is hardly a sufficient basis for the drastic relief sought in the appellant's application.

In any event the appellant itself is not without fault. It could have commenced a lawsuit between 1965 and 1973 for any injury it may have attributed to devaluation and inflation, yet it failed to do so. It should now be barred by the doctrine of laches because of its unreasonable delay. *See, Finegan* v. *Lumberman's Mutual Casualty Co.*, 329 F.2d 231 (C.A.D.C. 1963).

Last, but in some ways most important, the practical implications should appellant's theories be accepted are truly overwhelming. Is every long term lease or contract to which the United States is a party subject to revision because of economic factors? As Judge Judd noted:

> The New York Times of November 4, 1975, lists eleven series of United States government bonds with maturities from 1980 to 1998 and coupons from 3 percent to 4-1/4 percent. Their holders might make the same argument as plaintiff, that they did not contemplate the present inflation when the bonds were issued. (A-12)

A judicial decision should not abrogate 31 U.S.C. § 463; rather, such an action should be left to that branch of the government charged with management of the fiscal affairs of the United States: the United States Congress.

CONCLUSION

The judgment dismissing plaintiff's complaint be affirmed.

Dated: January 26, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
Attorney for Defendant-Appellee,
United States Postal Service.

JOSEPHINE Y. KING,
RICHARD L. HUFFMAN,
Assistant United States Attorneys,
Of Counsel.

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of January 19 76 he served two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Bradley B. Davis, Esq.
1235 Park Avenue
New York, N. Y. 10028

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
27th day of January 19 76

Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1977